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Paper No. 14

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**MAY 20 2002**

**OFFICE OF PETITIONS**

In re Application of  
Harrington et al.  
Application No. 09/760,897  
Filed: January 17, 2001  
Attorney Docket No. 0221-0003OC

DECISION  
DISMISSING PETITION

This is a decision on the petition under 37 CFR 1.53(e), filed March 8, 2002, to accord the above-identified application a filing date of January 17, 2001, with an indication that 166 pages of the application were present on filing.

The petition is **DISMISSED**

Applicant must submit any reply to this decision within TWO MONTHS of this mailing. See 37 CFR 1.181(f). Extensions of time are not available under 37 CFR 1.136(a) or (b). No further petition fee is due.

The instant application papers were deposited on January 17, 2001, as a purported continuation of application No. 09/515,124 filed February 27, 2000.<sup>1</sup>

However, on January 9, 2002, a "Notice of Omitted Item(s)" was mailed indicating that pages 53 and 54 of the specification were missing. The Notice offered 3 alternate options for action: (1) applicant could submit a petition and its fee along with evidence of deposit and contend the missing items were in fact deposited with the other application papers, (2) the missing items could be supplied along with a petition under 37 CFR 1.182 and its fee, and the date of submission would become the filing date, or (3) a failure to proceed under either foregoing option would be treated as a constructive acceptance of the application papers as deposited with the USPTO.

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<sup>1</sup> Any issues as to the prior application's filing date, as discussed in a communication from applicant received March 5, 2002, as well as in the instant petition in this application, must be resolved by way of an appropriate petition captioned for, and filed in, the parent application. See 37 CFR 1.5.

In reply, applicant filed the instant petition and fee, and includes a copy of itemized postcard receipts for both the above-identified application papers, as well as those of the prior application. Petitioner points to the postcard receipt for the prior application papers, which specifically acknowledges receipt of 166 pages of specification in the USPTO on February 25, 2000, and the receipt for this application, indicating that applicant was filing a "complete copy of the prior application [papers]." Petitioner urges that since the parent application was complete and included 166 pages, and the papers filed for this application were asserted to be a copy of that complete application, all 166 pages for this application are entitled to a filing date of January 17, 2001,

Petitioner's arguments are not convincing. An appropriately itemized postcard receipt will serve as *prima facie* evidence of receipt at the USPTO of the documents enumerated thereon on the date in question. See MPEP 503. However, the postcard receipt for this application merely sets forth applicant's intent to file a copy of the prior application. Inspection of the proffered receipt for this application shows that the USPTO merely acknowledged receipt of applicant's intended filing; but that the USPTO did not acknowledge receipt of 166 pages of specification drawings and claims for this application on January 17, 2001.

The postcard receipt for this application did not separately list the number of pages of the application papers that were being submitted. As set forth in MPEP 503, a postcard receipt will **not** serve as *prima facie* evidence of receipt of any item that is not adequately itemized on the postcard, and specifically sets forth that a receipt bearing a general indication of the filing of an application will not, as here, serve as evidence of receipt of any missing pages. Thus, since the receipt in question did not separately list the exact number of pages of the application being filed, but merely that an application was being filed, the instant postcard cannot be relied upon as evidence that the missing pages 54, 55 in question were received at the USPTO on January 17, 2001.

At best, the evidence supplied with the petition demonstrates applicant's attempt to file a copy of the prior application, not that all 166 pages of that prior application were in fact received at the USPTO on the date in question. Likewise, applicant's attempt to "piggyback" the receipt of papers for the parent case which contained 166 pages must therefore fall of its own weight, as that postcard receipt of 166 pages of application papers for the parent case on February 25, 2000, does not refute the contents of this file which are the official record of what was received at the USPTO on January 17, 2001. Pages 54 and 55 of the specification are simply not in this file and cannot be located. Were the postcard receipt for the papers for this application annotated with the same detailed itemization as that for the prior application, and receipt of 166 pages for this application specifically acknowledged by the USPTO, then applicant's arguments would be better founded. It is unfortunate that the two postcards did not contain the same degree and specificity of itemization, assuming *arguendo* that petitioner did in fact mail all 166 pages to the USPTO.

Accordingly, the instant application is not entitled to a filing date of January 17, 2001, containing pages 54, 55 of the specification.

Petitioner is advised that, for future reference, when filing a continuing application, he may wish to include a statement in the transmittal letter or elsewhere in the application-as-filed which specifically incorporates by reference the entire disclosure of the prior application, for which an oath or declaration is supplied, to avoid the very situation which has arisen herein. This incorporation, however, can only be relied upon when a portion has been inadvertently omitted from the later submitted application parts. See MPEP 201.06(c).

Petitioner may wish to renew this petition (no additional fee) by way of requesting the earliest date of receipt at the USPTO of the missing pages as the filing date to be accorded this application. If this alternative is adopted, in order to be able to claim benefit of the prior application(s) under 35 USC 120, it will be necessary for petitioner to revive the prior application by way of a petition under 37 CFR 1.137(b) specifically directed to that application, for purposes of obtaining copendency. Otherwise, applicant must then appropriately amend the statement under 35 USC 120 appearing in this specification, first line, in view of the lack of continuity. Petitioner may also wish to concurrently file a separate petition in the prior application to resolve the filing date question.

This application is being returned to Technology Center AU 1655 for consideration of the amendment filed December 20, 2001.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                   Assistant Commissioner for Patents  
                              Box DAC  
                              Washington, D.C. 20231

OR

U.S. Patent and Trademark Office  
P.O. Box 2327  
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By FAX:                   (703) 308-6916  
                              Attn: Office of Petitions

By hand:                  Crystal Plaza 4, Suite 3C23  
                              2201 South Clark Place  
                              Arlington, VA

Telephone inquiries concerning this decision may be directed to the undersigned at  
(703) 305-1820.

A handwritten signature in black ink, appearing to read "Brian Hearn". The signature is fluid and cursive, with the first name "Brian" and last name "Hearn" clearly distinguishable.

Brian Hearn

Senior Petitions Examiner

Office of Petitions

Office of the Deputy Commissioner

for Patent Examination Policy